IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 324 of 2001

in

SPECIAL CIVIL APPLICATIONNo 12531 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE A.R.DAVE
and
Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

V K MANSURI

Versus

O N G C LTD.,

Appearance:

1. LETTERS PATENT APPEAL No. 324 of 2001

MR AK CLERK for Appellants No. 1-9

MR RAJNI H MEHTA for Respondent No. 1

RULE SERVED BY DS for Respondent No. 2

DELETED for Respondents No. 3-5

CORAM : MR.JUSTICE A.R.DAVE
and

MR.JUSTICE D.P.BUCH

Date of decision: 06/11/2001

CAV JUDGEMENT

(Per : MR.JUSTICE D.P.BUCH)

The appellants above named have preferred this Letters Patent Appeal under clause 15 of the Letters Patent in order to challenge the judgment and order dated 30.3.2001 recorded by the learned Single Judge in Special Civil Application No.12531 of 2000 under which the learned Single Judge dismissed the said petition of the appellants at the admission stage. The appellants above named preferred the aforesaid Special Civil Application in this Court against the respondents above named stating that the petitioners have been performing work of a permanent nature in the premises of respondent No.1 and they have been performing their duties continuously and without any break since 1981. That with a view to avoid grant of permanency benefits to the appellant, respondent no.1 has shown the appellants as employees of a contractor. That the appellants are, at present, working through respondent No.2 and prior thereto the appellants were working through Ahmedabad Electricity Company Ltd. which was shown as contractor of the first respondent. That in fact, they were and are the employees of the first respondent but the first respondent goes on changing the contractors. However, all the contractors have continued the appellants as their employees. However, according to the case of the appellants, they are not shown to be employees of the first respondent with a view to avoid grant of permanency benefits to the appellants. It was, therefore, the prayer of the appellants above named that respondent No.1 be directed to absorb the petitioners in permanent employment by relaxing the requirement of age in their favour from the date on which the other similarly situated employees have been absorbed by the first respondent and to grant the appellants all consequential benefits on that basis. The appellants also contended before the learned Single Judge that the persons appointed subsequent to the appointment of the appellants have been made permanent and despite the fact that the appellants were appointed long back, they have not been made permanent. The appellants also contended before the learned Single Judge that a Special Civil Application was earlier filed, being Special Civil Application No.2573/97, before this Court. That in the said matter, an order was passed directing the Regional Labour Commissioner to enquire into the matter and submit his report on the point of actual working of the appellants. The appellants further contended before the

learned Single Judge that the Regional Labour Commissioner has verified the position on the spot and submitted his report and identified 70 of the employees as belonging to the categories in which the employment of labour was prohibited by notification dated 8.9.1994 issued under section of the Contract Labour (Abolition & Regulation) Act, 1970. (hereinafter referred to as 'the Act'). That since the notification has been issued as aforesaid and as per the report of the Regional Labour Commissioner, the appellants were working in the categories in which the contract labour was prohibited by the aforesaid notification dated 8.9.1994, the appellants automatically became the direct employees of the first respondent and, therefore also, according to their case, they were entitled to the aforesaid benefits of absorption, permanency and all consequential benefits. Therefore also they claimed the said benefits in the said writ petition. Therefore, they filed the aforesaid petition claiming that the aforesaid relief may be granted to the present appellants. The learned Single Judge appreciated the pleadings, documents and arguments and thereafter the learned Single Judge found that the present appellants were not employed in the employment of the first respondent. He also came to a decision that the appellants were working as Plant Asstt. Class II and therefore, their employment was not covered by the said Notification dated 8.9.1994. The learned Single Judge also found that the said Notification covered the post of Boiler Operators and not the post of Plant Asstt. Class II and, therefore, even under the said notification the contract labour was not abolished with respect to cadre in which the appellants were employed and, therefore also the appellants were not entitled to any benefit of permanency benefit or absorption in the employment of the first respondent. Consequently, the said petition was dismissed on merit by the learned Single Judge.

2. Feeling aggrieved by the said judgment and order of the learned Single Judge, the appellants have preferred this Letters Patent Appeal before this Court under Clause 15 of the Letters Patent. Here it has been mainly contended that the learned Single Judge has committed serious error in not properly appreciating the decision of the Hon'ble Supreme Court in the case of Air India Statutory Corporation v. United Labour Union reported in AIR 1997 SC 645 wherein it has been held that the appellants are entitled to the benefit of absorption in the category in which employment of contract labour has been prohibited and that the writ petition is maintainable and such employees are entitled to be absorbed as permanent employees of the principal

employer. That the learned Single Judge has not properly appreciated the documentary evidence produced on record which proves in order to show that the appellants were employed as Boiler Operators/Boiler Attendants. That the learned Single Judge has also erred in not holding that the remedy of raising the dispute under section 10 of the Industrial Disputes Act, 1947 is too elusive and therefore a petition under Article 226 of the Constitution of India is maintainable. That the learned Single Judge has erred in not directing absorption of the appellants in the employment of the principal employer i.e. respondent no.1. That the learned Single Judge has also committed serious error in dismissing the petition. That on the whole, the judgment and order of the learned Single Judge are illegal and erroneous and deserve to be set aside. The petitioners have, therefore, prayed that the present appeal be allowed, the judgment and order of the learned Single Judge dated 30.3.2001 be set aside and the relief in terms of para 16 of the Special Civil application referred to above may be granted in favour of the appellants with costs all throughout.

3. On submission of the Letters Patent Appeal, notice was ordered to be issued. Mr R H Mehta, learned Advocate appears on behalf of respondent no.1. None appears for respondent no.2.

4. We have heard the arguments advanced by the learned Advocates for the parties and have perused the papers. The learned Advocate for the appellants has argued the matter at length saying that the learned Single Judge has committed serious error in holding that the present appellants are not the direct employees of respondent no.1. Many documents have been produced and we were taken through the said documents produced on record in order to argue that the appellants were direct employees of the respondent. At the same time, the learned Single Judge has appreciated the materials placed before him in order to come to a finding that the appellants were not direct employees of the first respondent no.1. The learned Single Judge has also found that despite notification dated 8.9.1994 prohibiting the contract labour in the cadre of Boiler Operators, the appellants could not be directed to be absorbed in the employment of the first respondent as they were not working in the said cadre but they were working as Plant Asstt. Class II.

5. It would be material to consider here that the said findings have been arrived at by the learned Single Judge on the appreciation of documentary evidence

produced on record. The appellants had approached this Court by way of writ petition. It is well known that writ petitions are being disposed of on appreciation of evidence and documents produced on record. It is also well settled that the disputed questions of fact cannot be gone into in writ petitions. If the parties are interested in going for a decision on disputed question of facts, then the remedy is elsewhere. If there is any industrial dispute, the parties have to go to the Labour Court under order of Reference. If there is any civil dispute, the parties may go to a Civil Court. The parties are at liberty to produce oral and documentary evidence in support of their rival case before the Labour Court or before the Civil Court, as the case may be. The parties may be at liberty to cross-examine witnesses of the opposite side. On appreciation of oral and documentary evidence, the Labour Court or the Civil Court, as the case may be, would be in a better position to deal with the factual aspects in order to decide the disputed questions of fact. In the present case also the appellants have come out with a case that they were the direct recruits and employees of the first respondent and they have been simply shown as employees of the contractors. The appellants have also taken up a stand that they were in fact working as Boiler Operators and they were wrongly shown to have been working as Plant Asstt.Class II. It has also been argued by Mr Clerk that even by virtue of notification dated 8.9.1994 issued under section 10 of the said Act, the appellants have become entitled to the benefit of automatic absorption in the employment of respondent No.1, as the contract labour has been abolished, by the said notification with respect to the post and cadre in which they have been working. It has further been contended that even the report of the Regional Labour Commissioner also supports the case of the appellants that the contract Labour has been abolished in respect of the cadre in which the appellants have been working.

6. On the other hand, respondent no.1 has come out with a case that the appellants were never in the employment of the first respondent. They have denied that the appellants were working as Boiler Operator. The first respondent also contended that the appellants were working as Plant Asstt.Class II in the employment of the second respondent. This shows that there were disputed question of fact and therefore the proper remedy for the present appellant was to approach the Labour Court with a reference in order to get their disputes settled which are based on disputed questions of facts. The learned Advocate for the appellants has contended that earlier it

was the trend and understanding of law that as soon as a notification has been issued by the appropriate authority prohibiting contract labour in respect of a cadre, then in that event, the workmen working in that cadre, in the employment of the contract would be treated to be a direct employment of the principal employer automatically by virtue of such notification under section 10 of the said Act and, therefore, the petition was filed by the appellants for the said remedy. Therefore, learned Advocate for the appellants has also argued before us that in view of the latest pronouncement of the Hon'ble Supreme Court, it would not be possible for the High court to decide disputed question of fact and there is no automatic absorption in the employment of the principal employer. For this purpose, reference has been made to a decision in the case of Steel Authority of India v, National Union Water Front Workers, reported in 2001 AIR SCW 3574. There it has been laid down that despite issue of notification under section 10 of the said Act prohibiting contract labour in a particular employment, there is nothing in the said Act contemplating automatic absorption of contract labour by a principal employer. However, the contract labour will have to be given preference in an employment by the principal employer. Therefore, it has been clearly laid down that the law does not provide for automatic absorption. Then it has further been observed that it would be open to the workman to approach a competent authority to get a decision on the disputed question of fact. The Supreme Court has also observed in para 122 (5) and (6) as follows:

"(5) On issuance of prohibition notification under section 10(1) of the CLRA Act prohibiting employment of contract labour or otherwise, in an industrial dispute brought before it by any contract labour in regard to conditions of service, the industrial adjudicator will have to consider the question whether the contractor has been interposed either on the ground of having undertaken to produce any given result for the establishment or for supply of contract labour for work of the establishment under a genuine contract or is a mere ruse/camouflage to evade compliance of various beneficial legislations so as to deprive the workers of the benefit thereunder. If the contract is found to be not genuine but a mere camouflage, the so-called contract labour will have to be treated as employees of the principal employer who shall be directed to regularize the services of the

contract labour in the concerned establishment subject to the conditions as may be specified by it for that purpose in the light of para 6 hereunder:

(6) If the contract is found to be genuine and prohibition notification under section 10(1) of the CLRA Act in respect of the concerned establishment has been issued by the appropriate Government, prohibiting employment of contract labour in any process, operation or other work of any establishment and where in such process, operation or other work of the establishment the principal employer intends to employ regular workmen he shall give preference to the erstwhile contract labour, if otherwise found suitable and, if necessary, by relaxing the condition as to maximum age appropriately taking into consideration the age of the workers at the time of their initial employment by the contractor and also relaxing the condition as to academic qualifications other than technical qualifications."

From the above observations, it becomes clear that it is for the industrial adjudicator to consider the question whether the contractor has been interposed either on the ground of having undertaken to produce any given result for the establishment or for supply of contract labour for work of the establishment under a genuine contract or is a mere ruse/camouflage to evade compliance of various beneficial legislations so as to deprive the workers of the benefit thereunder. It is also observed that if the contract is found to be not genuine but a mere camouflage, the so-called contract labour will have to be treated as employees of the principal employer who shall be directed to regularize the services of the contract labour in the concerned establishment subject to the conditions as may be specified by it for that purpose in the light of the observations made in para 6.

7. In view of the above position, it is amply clear that this disputed question of fact can be decided only in an industrial dispute brought before an industrial adjudicator by appropriate reference. At this stage, learned Advocate for the appellants states that in view of this decision, it will be necessary for the present appellants to approach the appropriate authority for making reference to the Industrial Adjudicator for appropriate decision on the disputed question of fact and therefore, the appellants may be permitted to go for the

said remedy. As against this, Mr R H Mehta, learned Advocate appearing for respondent No.1 has argued and rightly too, that no such permission by this court is required to be obtained by the appellants for obtaining reference for deciding the said questions of facts. He also argues that if the appellants desire to go for reference before the Labour Court, it is always open to them to do so without obtaining any permission of this Court.

8. It is very clear that neither under the Industrial Disputes act, 1947 nor under the observations of the aforesaid decision of the Hon'ble Supreme Court in the case of Steel Authority of India's case (supra), it has been laid down that the appellants are required to obtain any permission from this court for obtaining a reference for putting Labour Court machinery into motion. We feel that the appellants would certainly be at liberty to approach the Labour Court through appropriate reference for getting a decision on the disputed question of fact on the point as to whether the contract was genuine or not and as to whether the appellants were in the direct employment of the first respondent.

9. The learned Advocate for the appellants has also argued that this Court should pass an order continuing the present interim relief against the second respondent prohibiting the second respondent from terminating the services of the appellants for at least two to three months so that the appellants can approach the appropriate Labour Court and obtain appropriate interim relief from the said Court. In support of the said contention, the learned Advocate for the appellant has shown us certain decisions of this Court. In Special Civil Application No.11250/98, this Court has passed an order on 9.3.1999 (Coram : Rajesh Balia, J.) directing that the petitioner shall approach the conciliation officer with respect to their demands for which the present petition has been filed. It was further directed to maintain satus-quo in respect of service conditions of the petitioners. It was further directed that in case the present contract between the present employer as well as the contractor comes to an end, it will be open for the principal employer to award fresh contract by inserting a clause that the new contractor will continue the present petitioners during the continuation of interim relief. Almost a similar direction appears to have been given by this Court in Special Civil Application No.8090/99 wherein the order was passed on 16.2.2000 (Coram : Y B Bhatt, J.). It appears that similar protection was given in other cases also.

10. Here the facts are little different. The second respondent being the Contractor does not appear before the Court. The contract between the first respondent and the second respondent is going to expire by 30.11.2001. It is not certain as to whether the second respondent will get fresh contract, from the first respondent. Learned Advocate for the first respondent has made it clear that the first respondent invites tender and on proper scrutiny thereof, the contracts are being given every year. Therefore, it would not be certain as to who will get a contract with the year commencing from 1.12.2001. We do not have any idea as to whether the second respondent will get a similar contract from other principal employer, if not from respondent no.1. Therefore, it would not be just, legal and proper to direct the second respondent, beyond 30.11.2001, to continue the appellants in the employment of the second respondent. At the same time, if the services of the appellants are discontinued by the second respondent without following due process of law, then proper remedy would be available to the appellants also with which we are not concerned in this Letters Patent Appeal.

11. It is also required to be considered that even on issue of the aforesaid notification under section 10(1) of the said act, certain persons were absorbed by the first respondent in its services after taking interview and after ascertaining their suitability. The appellants were not found to be suitable and fit for being appointed in the employment of the first respondent. It would, therefore, also not be proper to burden the second respondent with any order directing the second respondent to continue the services of the appellants in its employment beyond 30.11.2001.

12. Moreover, the aforesaid decision of the Supreme Court makes it clear that there is nothing like automatic absorption on issue of notification under section 10(1) of the said act. In that view of the matter, the petition as well as the Letters Patent Appeal would fail against the first respondent In above view of the matter, it would not be desirable for this Court, sitting as a Court of appeal over the decision arrived at in a writ petition under Article 226/227 of the constitution of India, to pass any order against the second respondent which is not amenable to writ jurisdiction. Moreover, it would also be appropriate to consider a decision of Shiv Shankar v Board of Directors, UP State Road Transport Corporation, reported in (1995) Supp. 2 SCC 726 wherein

it has been clearly laid down that the Court should not pass any interim orders or should not continue the interim relief after dismissal of a writ petition filed under Article 226 of the constitution of India. In view of this decision also it would not be just, legal and proper to pass any order continuing the interim relief against respondent no.2, when such a relief cannot be granted against respondent no.1. In above view of the matter, it is not possible for us to accept the aforesaid argument advanced by Mr A K Clerk, learned Advocate for the appellants to continue the interim relief against respondent no.2 for at least three to four months with a view to enable the appellants to approach the Labour Court for appropriate remedy through appropriate reference.

13. Moreover, it is also required tobe considered that the aforesaid decision of the Hon'ble Supreme Court in Steel Authority of India's case (supra) was pronounced on 30.8.2001. It had soon received wide publicity. Soon thereafter, the appellants had all opportunities to go to the Labour Court under appropriate reference. The appellants have yet not made any move in this direction during the course of last about two months. In that view of the matter also, this is not a fit case wherein this Court should pass any order continuing the interim relief against the second respondent. It is also required to be considered that the contract between the two respondents will expire on 30.11.2001. There is nothing on record to show that services of the appellants are likely to be terminated by the second respondent before 30.11.2001. There is no likelihood to show that the first respondent is likely to terminate the contract with the second respondent before 30.11.2001. Therefore there is no danger of the services of the appellants at present. Therefore also there is no need to pass any order continuing the interim relief against the second respondent. Therefore, we are not inclined to pass any order continuing the interim relief against the second respondent beyond 30.11.2001.

14. It has to be made clear that the learned Single Judge has made certain observations with respect to the factual merits of the case. It is required to be noted that the said observations were made on the basis of documents and affidavits materials placed on record.

15. Since Mr A K Clerk, learned Advocate for the appellants-original petitioners has shown the desire of the appellants to approach the competent authority for a reference to a Labour Court for industrial adjudication

of an industrial dispute under the I.D. Act, 1947, we refrain from deciding the appeal on merits at the request of Mr A K Clerk, learned Advocate for the appellants and dispose of this Letters Patent Appeal in following terms:

(a) The appellants will be at liberty to approach the competent authority for a reference to a Labour Court for the industrial adjudication of an industrial dispute.

(b) If any such reference is made, the Labour Court will be required to deal with the issues referred to it. It will naturally decide the matter on the evidence produced before it without being influenced by the observations made by the learned Single Judge during the course of the judgment as well as by us in this appeal.

(c) At the request of Mr A K Clerk, learned Advocate for the appellants-original petitioners, we do not make any observation on legal or factual merits in this appeal.

(d) The request of Mr A K Clerk, learned Advocate for the appellants to continue the interim relief prohibiting termination of services of the appellant against the second respondent for a period of three to four months is rejected for the reasons recorded hereinabove.

The appeal is accordingly disposed of. Notice discharged with no order as to costs.

6.11.2001 [A R Dave, J.]

[D P Buch, J.]

msp